SUPREME COURT, U. S.
FEB 5 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1109

WAYNE O. WOODRUFF and ANDREW BARR,
Special Prosecutors,
Petitioners,

v.

RAY COWAN
UNITED STATES OF AMERICA, and JAKE JACOBSEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WAYNE O. WOODRUFF,
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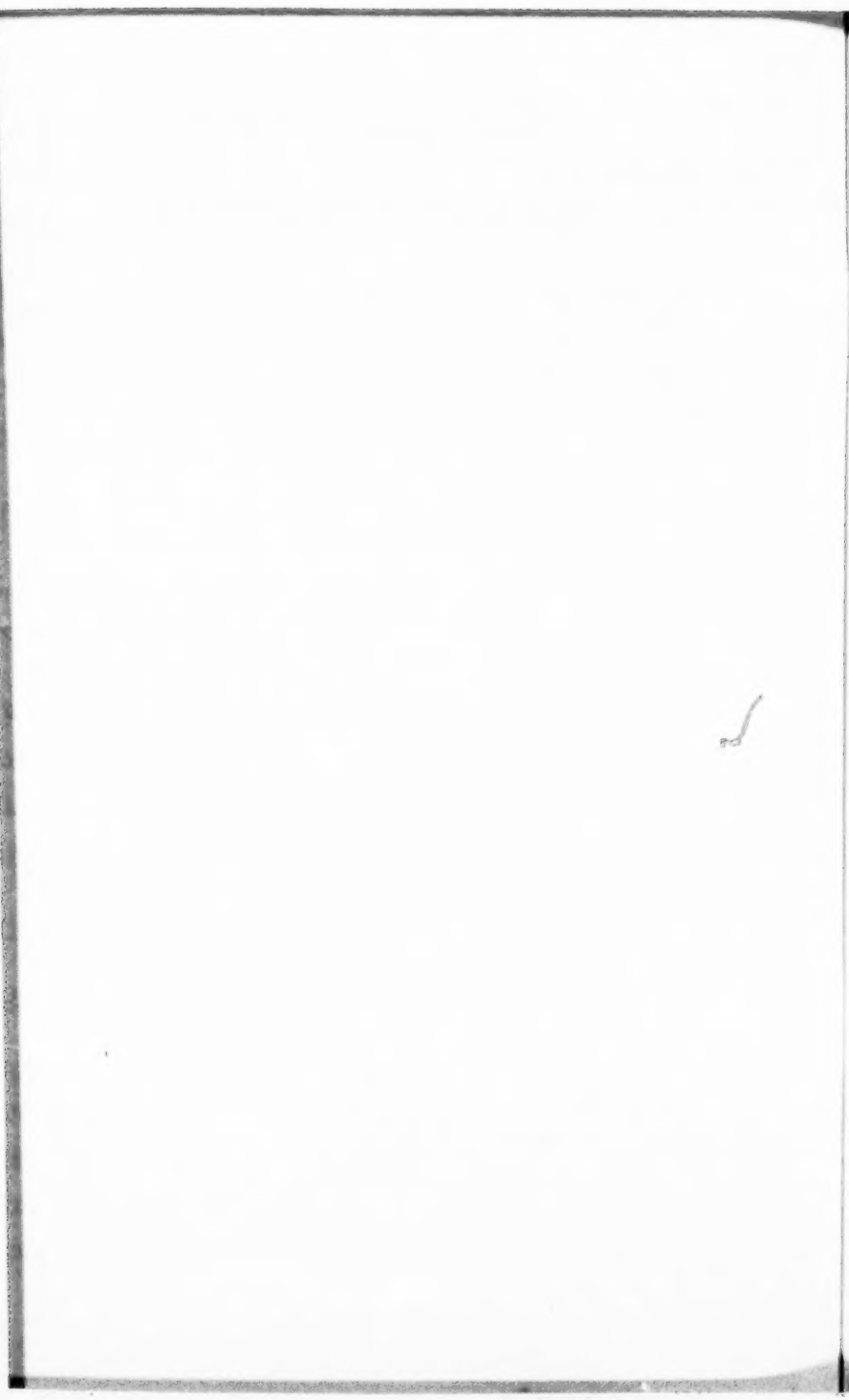

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In The

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OCTOBER TERM, 1975

No. .....

IN RE UNITED STATES OF AMERICA,
Petitioner,

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RAY COWAN and JAKE JACOBSEN,
Defendants,

WAYNE O. WOODRUFF, et al., Special Prosecutors,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Wayne O. Woodruff and Andrew Barr, Special Prosecutors, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 524 F.2d 504 (App. p. A-28), the District Court's memorandum

opinion and order overruling motion to dismiss is reported at 381 F.Supp. 214 (App. p. A-1), and the District Court's order appointing special prosecutors is reported at 396 F.Supp. 803 (App. p. A-21).

JURISDICTION

The opinion of the Court of Appeals sought to be reviewed was entered on December 8, 1975. On January 8, 1976, Justice Louis F. Powell, Jr., entered an order extending time to file petition for writ of certiorari to and including February 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

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QUESTIONS PRESENTED FOR REVIEW

1. What is the scope of the discretion of a United States District Judge under Rule 48(a) to deny a motion of a United States Attorney to dismiss an indictment?

2. Under the facts of the case at bar did the District Court abuse its discretion in denying the Government's motion to dismiss the indictment when the sole reason offered to support the motion was that the Government had entered into a plea bargain requiring the dismissal of the indictment, which in the opinion of the Government was in the public interest?

3. In a case where the District Court has denied the United States Attorney's motion to dismiss an indictment and the United States Attorney has given notice of his intention not to prosecute the case, can the District Court, to avoid frustration of its responsibility to protect the public interest, appoint special prosecutors?

RULE OF PROCEDURE INVOLVED

This case involves Rule 48(a), Fed. R. Crim. Pro., which provides:

> "DISMISSAL
>
> (a) By Attorney for Government. The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

STATEMENT

The Watergate Special Prosecution Force, with the approval of the Department of Justice, made a plea bargain agreement on May 21, 1974 with Jake Jacobsen, whereby, in return for Jacobsen's testifying for the Government in criminal proceedings in Washington, D. C. and pleading guilty in Washington to a charge of bribing a public official, the Government would "dispose of" completely unrelated charges pending against Jacobsen in the United States District Court for the Northern District of Texas, San Angelo Division.

The Texas charges were returned in an indictment on February 6, 1974 signed by the United States Attorney for the Northern District of Texas. It charged Jacobsen and Roy Cowan, in Counts 1 through 6, with a series of offenses alleging the fraudulent misapplication of $825,000 of a San Angelo, Texas federally-insured savings and loan in which both Jacobsen and Cowan were directors and shareholders. The seventh count of the indictment charged only Jacobsen with false declarations before the Grand Jury investigating the misapplication of the funds. Following the return of the Texas indictment, Jacobsen and Cowan pleaded not guilty and various pre-trial motions had been filed and proceedings conducted.

Under the terms of the May 21, 1974 plea bargain agreement Jacobsen agreed to plead guilty to a one-count charge to be filed in the District of Columbia alleging a violation of 18 U.S.C. § 201(f) (bribing a public official). Also, Jacobsen agreed to make a full and truthful disclosure of all relevant information and documents within his knowledge and posses-

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sion concerning matters then under investigation by the Watergate Special Prosecution Force and, if required, to be a witness on charges arising out of any such investigation. The Watergate Special Prosecution Force agreed not to press any other charges against Jacobsen in the District of Columbia which might arise out of the matter under investigation and to "dispose of" the Texas indictment.

Pursuant to the terms of the plea bargain, the United States Attorney for the Northern District Court filed, on August 29, 1974, a written motion to dismiss all counts of the Texas indictment against Jacobsen. The motion asserted that the Watergate Special Prosecution Force and the Attorney General of the United States believed that the testimony of Jacobsen was necessary to the investigation and prosecution of the pending case in Washington, and that the Watergate Special Prosecution Force believed that absent the plea agreement, Jacobsen's testimony would be lost in the pending Washington case and in any other investigation which might result in Jacobsen's being called as a witness. The motion also stated that the Watergate Special Prosecution Force believed that the best interest of justice would be served by disposing of the Texas indictment against Jacobsen. The written motion presented no factual basis for the stated beliefs of the Watergate Special Prosecution Force or the Attorney General.

A hearing on the motion to dismiss was conducted before United States District Judge Robert M. Hill on August 29, 1974. Judge Hill repeatedly asked the United States Attorney if he would like to make any statement or offer any evidence in support of the motion. In response, the United States At-

torney stated that he did not have any comments to present in support of the motion and he believed that the motion contained all facts that he could offer to the court. The attorney for Jacobsen joined in the Government's motion, but stated he also did not have any information to offer other than that set out by the Government in its motion.

At the conclusion of the hearing, Judge Hill took the matter under advisement. On September 6, 1974, Judge Hill entered a memorandum opinion and order overruling the Government's motion. (App. p. A-1). In so ruling, the district court stressed that the Government had offered no statement or evidence in support of its motion and, consequently, that the court had no factual basis on which to grant dismissal. The court further stated that the Government's bare assertion — standing alone — that the best interest of justice will be served is not sufficient to justify the court's granting a motion to dismiss.

On September 12, 1975, the Government filed its notice of intention not to prosecute and advised the court that the Department of Justice did not intend to proceed to trial in the matter.

On October 23, 1974, Judge Hill entered an order appointing special prosecutors and directing that they "shall have full authority to control the course of investigation and litigation related to the offenses charged in the indictment and to handle all aspects of the case to the same extent as a United States Attorney in any criminal prosecution." (App. pp. A-26 - 27).

On October 29, 1974, the Government filed with the dis-

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trict clerk notice of appeal of the order appointing special prosecutors and shortly thereafter filed in the United States Court of Appeals for the Fifth Circuit a petition for writ of mandamus seeking to have the order appointing special prosecutors vacated and the Texas indictment dismissed.

Following the submission of briefs and oral argument by the special prosecutors and the Government, the Fifth Circuit, on December 8, 1975, filed its opinion which reversed the action of the district court and remanded the case with directions to the district court to sustain the Government's motion to dismiss the indictment. (App. p. A-28.)

REASONS FOR GRANTING THE WRIT

In its opinion in this case the Fifth Circuit recognized:

> ". . . that no federal appellate court has come face to face with the asserted power of the district court under 48(a) to grant or withhold leave to dismiss a criminal prosecution once begun. The question is squarely presented here for the first time as a controversy between the Executive and Judicial Branches of government involving opposing asserted powers under the Rule." (App. pp. A-37-38.)

Prof. Charles Alan Wright, in *Federal Practice and Procedure*, Vol. 3, sec. 812, p. 305 (1969), also believes that each district judge is left to struggle with the uncertainties of Rule 48(a) as best he can.

Petitioners' belief is that the Fifth Circuit correctly analyzed the history of Rule 48(a) in concluding that the rule, as promulgated by the Supreme Court and adopted by Congress, was:

> ". . . intended to make a significant change in the common law rule by vesting in the courts the power and duty to exercise a discretion for the protection of the public interest." (App. p. A-40.)
>
> * * *
>
> ". . . [W]e think it manifestly clear that the Supreme Court intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice." (App. p. A-43.)

However, the Court of Appeals erred in delineating the scope of the district court's discretion too narrowly.

Neither the language of Rule 48(a) nor its history afford a basis for reading into the rule a presumption in favor of the Government. Nevertheless, the Court of Appeals has now held

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that a decision of the Executive to terminate a prosecution is presumptively in the public interest and in good faith. Further, the Court held that the judgment of the Executive "should not be judicially disturbed unless clearly contrary to manifest public interest." (App. pp. A-45 - 46.)

Prof. Wigmore, in his treatise on evidence, states:

> "A presumption . . . is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent." *Wigmore on Evidence,* Vol. IX, sec. 2491, p. 288 (1940).

Unlike other presumptions, which operate in favor of one party to litigation and against another party who, as an adversary, has the opportunity to develop evidence to attempt to overcome the presumption, the extraordinary presumption created by the Fifth Circuit operates against the district court. In effect, the Fifth Circuit has created a presumption relieving the Executive of any obligation to explain or justify its exercise of discretion or to provide the district court with a factual basis of an exercise of judicial discretion — although the district court does not stand in an adversary position.

In the case at bar the United States Attorney repeatedly declined to offer factual support for the conclusion of the Attorney General and the Watergate Special Prosecution Force that dismissal of the indictment was in the public interest. In such circumstance, the district court could not meet its responsibility to independently examine the exercise of discretion by the Executive.

The history of Rule 48(a) reveals that in promulgating the rule, the Supreme Court considered *Young v. United States,*

315 U.S. 257 (1942) pertinent in defining the role of the trial court in terminating a prosecution. In *Young* the Government confessed error on appeal by a physician from a conviction for violating the Harrison Narcotic Act. Refusing to find such a confession binding, this court wrote:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine *independently* the errors confessed." 315 U.S. at 258-259; emphasis added.

The role of independent, sound judicial discretion in the termination of a criminal proceeding was recognized in *Santobello v. New York*, 404 U.S. 257, 260 (1971):

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the adminstration of justice."
>
> * * *
>
> "There is, of course, no absolute right to have a guilty plea accepted." *Lynch v. Overholser*, 369 U.S. 705, 719 (1962); Fed. Rule Crim. Proc. 11. A court may reject a plea in exercise of sound judicial discretion." 404 U.S. at 262.

The Fifth Circuit, in creating this presumption permitting the Executive the unchallengeable power to refuse to offer a factual basis for its discretion, and in curtailing judicial discretion to a mere determination of whether there was a clear abuse of Executive discretion, has so restricted the scope of

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judicial discretion that the district court cannot independently exercise sound judicial discretion to protect the public interest.

The inappropriateness of the undue restriction placed upon the district court's discretion by the Fifth Circuit opinion is emphasized by examination of the discretionary latitude extended the district court by Rule 11(e), Fed.R.Crim.Pro. [effective December 1, 1975].

Rule 11(e)(1) sanctions plea bargaining and states that a plea bargain may provide that, upon the defendant's entry of the negotiated plea, the Government will move for dismissal of other charges pending against the defendant. Rule 11(e)(2) specifically provides that the judge may accept or reject the plea agreement. In describing the discretionary latitude provided the district court, the "Notes of Committee on the Judiciary, House Report No. 94-247" state:

> "Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements." 18 U.S.C.A. Rule 11, Historical Note, p. 18.

Likewise, Rule 48(a) does not undertake to limit or restrict the independent exercise of sound judicial discretion. The Advisory Committee on Rules stated:

> "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge." 18 U.S.C.A. Rule 11, Notes of Advisory Committee on Rules, p. 26.

Thus, the operation of Rule 48(a) will necessarily be intertwined with that of Rule 11(e).

The application to Rule 11(e) of the doctrine of a restricted judicial review, as enunciated by the Fifth Circuit, will result in a total frustration of the district court's ability to exercise sound independent judicial discretion to protect the public interest. Such a result clearly was not contemplated by the constitution or by the framers of Rule 11(e).

In this case, the only presentation by the Government in support of its motion for leave to dismiss was the conclusionary statement that:

> "6. The Office of the Special Prosecutors believed that if it did not enter into the agreement (Exhibit A) the testimony of the Defendant Jacobsen before the District of Columbia Grand Jury would be lost and the testimony of the Defendant Jacobsen would be lost in any other investigation where he was called as a witness."
>
> "7. The Office of the Special Prosecutor believed that if it did not enter into the agreement (Exhibit A) the testimony of the Defendant Jacobsen would be lost in the trial of the District of Columbia case and any other case where he might be called as a witness." *United States Attorney's Motion to Dismiss.*

While the motion also concluded that the United States believed that the testimony of defendant Jacobsen was necessary to the investigation and the prosecution of the case in the District of Columbia, no factual presentation was made.

Upon this meager showing, Judge Hill exercised sound discretion in discharging the judicial duty placed upon him under the scope of Rule 48(a) and refused leave to dismiss the indictment.

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Upon this record, the Fifth Circuit has now held while the district court was clothed with a discretion to determine whether the dismissal of these charges was clearly contrary to the public interest, the court exceeded the bounds of its discretion and committed a clear error of judgment in the conclusion it reached, relying on *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954) (Magruder, C. J.), as quoted in *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 71 (2nd Cir. 1967). (App. p. A-46.)

In re Josephson, supra, where the Fifth Circuit draws upon Judge Magruder's phrase that they had "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors," was a civil action not involving the constitutional prescriptions and the public interest before the district court for consideration in this case. 218 F.2d at 182.

The district court's action in this case met the standards promulgated in *Particle Data Laboratories, Inc. v. Coulter Electronics, Inc.*, 420 F.2d 1174, 1178 (7th Cir. 1969):

> "Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary. *Sears, Roebuck and Co. v. American Mutual Liability Insurance Co.*, 7th Cir., 372 F.2d 435, 438 (1967).
>
> '[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' *Delno v. Market St. Ry. Co.*, 9th Cir., 124 F.2d 965, 967 (1942)."

Judge Hill's determination that a dismissal would be clearly

contrary to the public interest followed the directive of *Young v. United States*, 315 U.S. 257, 259 (1942):

> "The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties."

The burden of showing an abuse of discretion by the trial court is upon the Government. Assuming, *arguendo*, that the trial court was bound to grant leave to dismiss if there was record evidence of "good faith" by the prosecution (a construction of Rule 48(a) denying its history and obvious purpose), the Government cannot simply present the plea agreement, stand mute and then be heard to argue that in the absence of affirmative evidence of bad faith it must be found by appeal that the trial court abused its discretion. In sum, the refusal of the Government to adduce any factual support for its conclusionary assertion should not be permitted to work a frustration of the trial court's duty.

But, in fact, the trial court's decision was not based on an erroneous conclusion of law nor does the record lack evidence on which the court rationally could have based its decision; therefore, there is no abuse of discretion. *see Premium Service Corp. v. Sperry and Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975).

Assuming that Judge Hill must discharge the judicial duty imposed upon him by Rule 48(a), it is essential that the court have corresponding power to fulfill that duty. The power exer-

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cised by Judge Hill was that of appointing special prosecutors.

One source of such power to appoint stems from his inherent power to avoid a frustration of his judicial duty, a frustration which inevitably followed from the government's unwillingness to comply with Rule 48(a). As stated by Justice Brandeis in *Ex Parte Peterson*, 253 U.S. 300, 312 (1920):

> "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific *judicial* duties, as they may arise in the progress of a cause." (emphasis added.)

And where the judicial duty is granted by statute, the power of appointment is a part of that statutory grant. As stated by Chief Justice Marshall:

> "It has been justly observed that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication." *United States v. Hill*, 26 F. Cas. 315, 317 (C.C.Va. 1809; No. 15,364.)

The North Dakota Supreme Court upheld a trial court's appointment of a special prosecutor, reasoning that a common law right of prosecutorial control was overturned when the court was by statute required to pass on dismissal and that such power was implicite in the statutory grant of responsibility. *State v. Lauder*, 90 N.W. 564 (N.D. 1902).

A second source of power for the appointment of special prosecutors is the court's supervisory power over the administration of criminal justice. This doctrine is related to the power to avoid a frustration of judicial duty in that it is a power, by necessity, concomitant to judicial duty. The courts have recognized their responsibility in the administration of criminal law, cognizant that unlike most private litigation, there is a public interest as well as a private interest to be served. *see The Supervisory Power of the Federal Courts,* 76 Harv. L. Rev. 1658 (1963); *McNabb v. United States,* 318 U.S. 332 (1943).

No claim of absolute executive discretion to prosecute can override the court's supervisory power of justice. As stated by Justice Roberts in *Sorrells v. United States,* 287 U.S. 435 (1932) (joined by Justices Stone and Brandeis):

> "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." 287 U.S. at 457.

See, e.g., *Lenske v. United States,* 383 F.2d 20 (9th Cir. 1967); *Dixon v. District of Columbia,* 394 F.2d 966 (D.C. Cir. 1968); and *United States v. McLeod,* 385 F.2d 734 (5th Cir. 1967).

In sum, Judge Hill possessed the power to appoint special prosecutors incident to both his responsibility to supervise the administration of criminal justice and to avoid the frustration of his congressionally imposed duty to grant or deny leave to dismiss prosecution. In so doing he was exercising power essential to the discharge of his duty and therefore inherent in the judiciary.

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CONCLUSION

A writ of certiorari should be issued.

Respectfully submitted,

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PROOF OF SERVICE

A true and correct copy of the foregoing petition for writ of certiorari has, on this .... day of February, 1976, been forwarded, certified mail, return receipt requested, first class postage prepaid to the following:

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